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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TERRY LOVELL BROADUS, Defendant and Appellant.	F075637 (Fresno Super. Ct. No. F15903615) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge. (Retired Judge of the Fresno Sup. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Jennifer Mouzis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Terry Lovell Broadus was arrested in Fresno County sitting in a stolen car that had been carjacked in Tulare County; the vehicle contained items that had been taken in a robbery in Fresno. The Fresno robbery was linked to an attempted robbery and another robbery in Fresno that occurred a few days earlier.

Defendant was initially charged with several offenses in the Superior Court of Tulare County based on the carjacking. He waived a preliminary hearing, pleaded no contest to the charges, and was sentenced to state prison. In the meantime, a complaint had been filed in the Superior Court of Fresno County that charged him with two robberies and an attempted robbery, and it was pending at the time of his plea in the Tulare County case.

After he entered his plea in Tulare County, defendant moved to dismiss the complaint in Fresno County and argued it violated the prohibition against multiple prosecutions as set forth in italicized portion of Penal Code[1] section 654, subdivision (a).

> "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. *An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other*." (Italics added.)

In his motion to dismiss, defendant argued there was evidentiary crossover between the carjacking in Tulare County and robbery offenses in Fresno County, all the offenses should have been charged in a single proceeding, and the Fresno County charges had to be dismissed under section 654, as interpreted in *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*). The court denied the motion and defendant pleaded no contest to the robbery charges.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant argues the trial court should have granted his motion to dismiss the charges in Fresno County and renews the argument he raised below – that the evidence for the carjacking in Tulare County and the robberies in Fresno County were transactionally related so that all of the charges should have been brought in a single case, and the failure to do so barred the subsequent proceedings in Fresno County.

Defendant waived preliminary hearings in both the Tulare County and Fresno County cases, and his appellate contentions are based on the investigative history of the offenses.

We find that the charges in the two counties were not evidentiarily related and defendant's motion to dismiss was properly denied.

FACTS[2]

We begin with the facts of the carjacking offense that occurred in Tulare County.

Carjacking of Theodore H. (Visalia Police Department Case No. 15-06771)[3]

Around 11:00 p.m. on May 20, 2015, officers from the Visalia Police Department responded to a carjacking dispatch and contacted Theodore H. (hereafter Theodore). Theodore was a pizza delivery person and attempted to deliver five pizzas to a certain apartment in an apartment complex. When he knocked on the door, an elderly woman answered and said she did not order the pizzas.

Theodore called the telephone number on the order receipt, which was xxx-xxx-0607. A person answered and gave him another apartment number in that same

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[2] To further personal privacy interests, we will refer to the victims by first name and last initial, or in the case of an unusual first name, by initials only. (Cal. Rules of Court, rule 8.90(b) & (b)(10).)

[3] The carjacking offense is the basis for defendant's motion to dismiss – that the Tulare County case should have been consolidated with the subsequent Fresno County robberies. The following facts for the Tulare County case are from the Visalia Police Department's reports about the carjacking, dated on or about May 21, 2015, submitted as exhibits to defendant's motion to dismiss.

apartment complex. Theodore went to that apartment and contacted an African-American male subject, who said he had ordered the pizzas but had left his wallet at a nearby store. The man asked Theodore for a ride to the store to pick up his wallet. Theodore declined and walked back to his car. The man walked with him. A second man appeared and forced Theodore to the ground. The first man pointed a handgun at Theodore's face, and demanded his money, the pizzas, and his car keys. Theodore complied. The gunman told him to stay down and not move.

Theodore reported both men ran to his car. The second man got into the driver's seat while the first man with the gun kept watching him. They had trouble starting the car. The gunman went back to Theodore, pointed the gun at him, and told him to start the car or he would shoot him. Theodore went to the car and showed the second man how to start the car. Once the car started, the gunman got into the passenger seat and told Theodore to get back on the ground. The two men left in Theodore's car.

Theodore reported his stolen car was a four-door, black, 2008 Ford Focus, and provided its license plate number.[4]

We now turn to the facts that were the basis for the separately-filed charges in Fresno County.

Attempted Robbery of Shane B. (Fresno County; Count 3)[5]

Shane B. (hereafter Shane) placed an online advertisement on Craigslist to sell a Sony PlayStation game console and seven games for $450.

Around 11:30 a.m. on May 22, 2015, Shane received a telephone call from xxx-xxx-0607, and the caller said he wanted to buy the merchandise. The caller wanted to

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[4] The Visalia Police Department report identified the carjacking as case No. A15-06771.

[5] Defendant did not submit the original report from the Fresno Police Department about the attempted robbery of Shane as an exhibit to his motion to dismiss. The following facts for count 3 are from the probation report, which stated that it relied on the Fresno Police Department's reports about the incident.

meet Shane right away at the parking lot on Cedar and Shields Avenue in Fresno. Shane agreed and drove to the parking lot.

When Shane arrived, he noticed a subject standing in front of a store. Shane parked his car in front of that store. Within a few minutes, a second man approached Shane's vehicle from behind. The second man asked Shane about the merchandise. As Shane answered the questions from the second man, he noticed the first man, who had been standing in front of the store, had walked behind them. The first man asked Shane if he was selling the equipment. The second man said to the first man, " 'Hey man, I got this.' " The first man did not respond and moved away. Shane and the second man resumed their conversation.

The first man suddenly moved closer and said, " 'Hey let me get that?' " Shane looked at the first man and realized he was pointing a gun at Shane's stomach. The second man raised his hands, backed away, and said he did not want to get involved. Shane told the first man, " 'You're not getting' my shit.' " Shane held onto his property and walked away. The first man briefly followed and then ran away.

Shane immediately called the police and reported the incident. Shane reported that he felt he had been set up, and that the second man played a part in the attempted robbery. Shane, who was a former Marine, provided a detailed description of the gun the first man used.

Robbery of Luis W. (Fresno County; Count 2)[6]

Around 4:00 p.m. on May 22, 2015, police officers responded to an apartment complex on Cedar Avenue in Fresno. Luis W. (hereafter Luis) reported an armed robbery had just occurred. Luis said he had placed an online advertisement on Craigslist to sell a Sony PlayStation game console and two games for $375. Luis received a

[6] Defendant did not submit the report from the Fresno Police Department for the robbery of Luis. The following facts are from the probation report, which stated that it relied upon the Fresno Police Department's reports about the incident.

telephone call from xxx-xxx-0607, and the caller said he wanted to buy the items. They agreed to meet at the apartment complex on Cedar Avenue.

Luis said he met two men in the parking lot of the apartment complex. They talked for a few minutes. Luis said the second man went to his car to get the keys to his apartment. The two men walked with Luis into the apartment complex. The first man pulled a revolver, pointed it at Luis, and told him to turn over the items. The gunman grabbed the items, asked Luis what else he had, and told him to empty his pockets. Luis pulled out his wallet, which contained $55. The second man grabbed the money. The gunman told Luis to walk away.

Luis reported that both men walked to a dark, charcoal grey, four-door sedan and drove away. Luis obtained the vehicle's license plate number and gave it to the police. A subsequent report stated the license plate number was for Theodore's stolen car.

Robbery of J.L. (Fresno County; Count 1)[7]

At 2:12 p.m. on May 25, 2015, police officers responded to an apartment complex on Nees Avenue in Fresno and contacted J.L., who reported that an armed robbery had just occurred. J.L. said he placed an online advertisement on Craigslist to sell a Sony PlayStation for $280. Around noon, he received a telephone call from xxx-xxx-0607, and a man said he wanted to buy it. J.L. told the man to meet him in front of J.L.'s apartment complex.

J.L. stated two men arrived, and J.L. took them into his apartment so they could look at the PlayStation. The men agreed to buy it but said they needed to get some money. The men said they would call J.L. when they had the money. J.L. said they left in a dark colored sedan.

[7] Defendant did not submit the report from the Fresno Police Department for the robbery of J.L. The following facts are from the probation report, which stated that it relied upon the Fresno Police Department's reports on the matter.

Around 1:57 p.m., one of the men called J.L. and arranged another meeting. A few minutes later, the two men arrived in front of J.L.'s apartment complex. J.L. had some of the merchandise in a box and was holding the other items. The first man pulled out a revolver and told J.L., " 'You think I'm going to pay you,' " and took the box of equipment from J.L. The gunman told J.L. that he wanted the rest of the equipment that J.L. was still holding. J.L. ran away and hid from them. The men left, and J.L. called the police.

Arrest of Defendant[8]

On the morning of May 26, 2015, Detective Royal and Investigator Moran, plainclothes officers assigned to the Fresno County Sheriff's Department Help Eliminate Auto Theft (HEAT) Team, saw a black, 2008 Ford Focus, with the license plate number matching that of Theodore's stolen vehicle, parked in a retail lot at Cedar and Dakota Avenues in Fresno. Royal was aware the vehicle had been reported stolen after a carjacking in Visalia.

The officers approached the vehicle and determined defendant was the driver and sole occupant. He was taken into custody without incident.

A handgun was wedged between the front driver's seat and center console. It was a black Smith and Wesson .38-caliber revolver with a wooden handle. The revolver had been reported stolen to the Visalia Police Department in June 2013. The officers also found four cellular telephones in the car.

Detective Royal advised defendant of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Defendant said that he understood his rights. Royal asked defendant where he got the car. Defendant said he bought it. When asked whether he got a good deal for it, defendant said it was " '[t]oo [g]ood.' " Royal asked

[8] The following facts are from Detective Royal's report dated May 26, 2015, about defendant's arrest and the recovery of the stolen car, submitted as an exhibit in support of defendant's motion to dismiss.

how much he paid for it. Defendant did not respond. Royal asked defendant from whom he received the gun. Defendant said it was a gift from a friend. Royal asked defendant to whom the gun was registered. At that point, defendant asked for an attorney, and the interview ended.

According to Detective Royal's report, the officers contacted Detective Sanchez of the Visalia Police Department and advised her that they had recovered the vehicle that had been carjacked in Visalia. Sanchez requested the impoundment of the vehicle, so it could be searched for evidence.

The same report stated that defendant was taken to Kingsburg and turned over to Detective Sanchez.

The report concluded that "[a]ll charges to be filed by Visalia Police Department under case 15-06777 in Tulare County. This report is for documentation only."

There was a handwritten notation at the bottom of the report: "DA 05/27/15."

INVESTIGATIVE HISTORY

Defendant's motion to dismiss was supported by additional police reports about what happened to the case after defendant was arrested and turned over to the Visalia Police Department.

Further Investigation by the Visalia Police Department

According to a report prepared by the Visalia Police Department, dated May 26, 2015, Detective Sanchez was notified around 11:40 a.m. on that date that officers in Fresno had recovered the vehicle that had been carjacked from Theodore in Visalia, arrested defendant, and found a firearm in the car.

Officer Kroeze of the Visalia Police Department prepared a photographic lineup with defendant's picture in the No. 3 position; the only photograph available of defendant had been taken in 2011.

Also, on May 26, 2015, Officer Kroeze showed the photographic lineup to Theodore, the carjacking victim. Theodore said he believed defendant looked familiar

but also "a little bit different." Theodore wrote on the comment section of the photographic lineup that defendant's picture " 'looked very similar' " to the suspect. Theodore said the suspect's gun was very small and looked like a .22-caliber revolver.

Theodore signed a consent form for the police to search his recovered vehicle, which had been stored at a tow yard.

Fresno Police Department Investigation

On or about June 3, 2015, Detective Rhames of the Fresno Police Department filed a report for case No. 15-035771, the attempted robbery of Shane; and the following "related" cases: No. 15-35811, robbery of Luis; No. 15-36562, robbery of J.L.; and Visalia Police Department case No. 15-6771, the carjacking of Theodore.

Detective Rhames stated on May 26, 2015, it was brought to his attention "that this [case—referring to Shane] and the above listed cases [referring to the robberies of Luis and J.L., and the Visalia carjacking] were related. The factors that tied them together were the suspect's description, vehicle used and the phone number the suspects called from."

Detective Rhames's report briefly described the three Fresno cases, consistent with the summaries above, with the following additional facts. Shane's wife was present during the attempted robbery; and Shane believed the revolver was empty. Luis reported the license plate on the car used by the suspects was 6ART249, which was matched to the stolen Ford Focus. J.L.'s girlfriend was present during the robbery of J.L. and saw the suspects.

Detective Rhames reported that he showed a photographic lineup to the Fresno victims with defendant's picture in the No. 4 position.[9] J.L. said defendant's picture

[9] Detective Rhames's report does not state whether he used the same photograph of defendant from 2011 that had been used by the Visalia Police Department in the photographic lineup that was shown to Theodore, the carjacking victim.

(No. 4) and two others were the most similar, and defendant was "the closest due to his 'long face.' " J.L.'s girlfriend picked another person as the suspect.

Luis said defendant's picture (No. 4) "looked like the suspect and that he was 80% sure."

Shane selected another person's picture and said he was "most similar" to the gunman.

Detective Rhames further reported that Theodore's recovered vehicle had been searched and a boxed Sony PlayStation was found in the backseat. J.L. identified the merchandise as the PlayStation that was stolen from him.

Detective Rhames stated the same telephone number (xxx-xxx-0607) was used in all three Fresno cases. Based on an "open" website, he determined the number was for a Verizon cell phone.

Detective Rhames obtained a court order and presented it to Verizon for the cell phone number's GPS data records. Verizon declined to comply and insisted on a search warrant. Detective Rhames reported that the search warrant was pending.

Detective Rhames reported defendant's "most recent listed phone number" was xxx-xxx-0607, the same number used in the Fresno robberies. Rhames cited "case 15-460" for the information about defendant's phone number.[10]

Detective Rhames reported that Kenneth Lee, one of defendant's associates, possibly matched the Fresno robbery victims' descriptions of the second suspect. He prepared a photographic lineup with Lee's picture in the No. 3 position and showed it to J.L., Luis, and Shane. J.L. said the person in the No. 3 position was the most similar.

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[10] Detective Rhames signed a declaration in support of an arrest warrant for defendant in the Fresno cases and stated that a 2015 domestic violence report involving defendant listed his last known phone number as xxx-xxx-0607. There is no indication in the record that defendant was convicted of any prior offenses.

Luis stated none of the individuals looked similar to the second suspect. Shane said another person looked similar to the second suspect.

Finally, Detective Rhames reported that he interviewed Shane on June 2, 2015, and asked about the gun. Shane had military experience with firearms and stated the suspect's gun had a wood grip and the metal was light or dull, like pewter. Rhames reported that Shane's description matched the gun found in the stolen car when defendant was arrested.

Arrest Warrant for Fresno Robberies

On June 3, 2015, Fresno Police Detective Rhames signed a declaration in support of an arrest warrant for defendant in Fresno County for two counts of robbery and one count of attempted robbery. The declaration summarized the Tulare and Fresno County cases as follows.[11]

> "Visalia Police took a report on 05/20/2015 of a PC 215 carjacking, VPD A15-06771. The victim [Theodore] is a pizza delivery driver and stated that he received a call from cell phone [(xxx) xxx-0607] with a person saying his name was Chris ordering 5 pizzas. When he arrived he found the apartment given was incorrect. He called 'Chris' back who said he was in apartment #4. The victim contacted a BMA [Black male adult] in front of the apartment who stated that he had ordered the pizzas but left his wallet at the 7-11, requesting a ride from the victim. The victim declined and when he walked to his car he was rushed by a second suspect and the first BMA pointed a pistol at his face. The suspect demanded his money and car keys, which the victim complied, fearing for his life. The suspects attempted to start the victim's vehicle but could not. Suspect #l then walked back over to the victim and made him explain how to start the car. The suspect then left his car. On 05/26/2015 the victim's vehicle was located and a Terry Broadus 06/14/1996 was arrested in the vehicle. The victim stated that Broadus was similar to the person who had robbed.

[11] We are quoting Detective Rhames's declaration in full because it is the primary basis for defendant's arguments that the Fresno and Tulare County cases were based on the same evidence and should have been consolidated in one prosecution.

"On 05/21/2015 Victim #1 [Shane] and Victim #2, husband and wife, placed an ad on Craigslist for a Sony Playstation and games they wanted to sell. The following day they received a phone call from a male (phone [(xxx) xxx-0607)] who stated he wanted to buy the Playstation and to meet at Cedar and. Shields, City of Fresno. The victims arrived at approx. 1215 hours they responded to 3423 N. Cedar, City of Fresno, and met a black male in the parking lot. The suspect began to ask questions about the console. A second BMA suspect walked up and the first male told him 'Hey man, I got this'. The victim and the first BMA continued talking when the second male stated 'Hey let me get that!' The victim looked at this suspect who was now holding a dark gray revolver and pointing it at the victim's stomach. The victim is a former Marine, well versed in firearms and tactics, and he was sure that the firearm was real and that it appeared the cylinder was empty. He told the suspect 'You're not getting shit', the suspect demanded the property again but the victim repeated his refusal and the suspect walked away. The first suspect reacted as if he was surprised, and walked away afterwards but the victim felt that he was also involved.

"On 05/22/2015 Victim #3 [Luis] had an advertisement placed on Craigslist to sell a Playstation 4 console and two games. He was contacted by a male from phone number [(xxx) xxx-0607] who arranged to meet with at the [apartments on North Cedar in Fresno]. Victim #3 met two BMA's in the parking lot of the complex. The suspects had the victim walk to a breezeway where one of the suspects pulled out a revolver from his paints and pointed it at him stating 'Give it up … ' taking the Playstation. The suspects also took $55 in cash from the victim's wallet. The suspect left in a gray vehicle, the plate, 6ART249, of which came back to a PC 215 vehicle.

"On 05/25/2015 Victim #4 [J.L.] had his Playstation for sale on Craigslist and he received a call from [(xxx) xxx-0607] with a male interested in buying the console. He arranged to meet the "buyer" in front of the rental office at [an apartment on Nees in Fresno], and met two BMA's there. The victim took the suspects back to his apartment so they could look at the console. The suspects said they would return with the money. The victim received a call from the same number with the suspects stating they wanted to meet in front of the rental office. When the victim met them in front of the rental office one of the suspects produced a silver handgun from his front pocket saying 'you think I'm going to pay you?' The suspect then took the console out of the victim's hands. The suspect demanded the other controller, which prompted to the victim to flee.

"On 05/26/2015 HEAT officers located the stolen vehicle and arrested [defendant] who was the sole occupant/driver. He was found in possession of a revolver, as described by the victims and several, cell phones. ARMS check of [defendant] showed his last known phone number, from a 2015 domestic report was [(xxx) xxx-0607]. Inside the PC 215 vehicle Victim [J.L.'s] PlayStation was still in the box in the back seat. The three victims in the above FPD cases could not positively identify [defendant]."

PROCEDURAL HISTORY

Tulare County Complaint

On May 28, 2015, two days after defendant was arrested in the stolen car and five days before the arrest warrant was prepared for the Fresno robberies, a felony complaint was filed in the Superior Court of Tulare County case No. VCF318587, charging defendant with count 1, carjacking of Theodore (§ 215, subd. (a)); count 2, second degree robbery of Theodore (§ 211); and count 3, receiving stolen property, the revolver found in the stolen car when defendant was arrested (§ 496, subd. (a)).

As to counts 1 and 2, it was alleged defendant personally used a firearm, a revolver, in the commission of the offenses (§ 12022.53, subd. (b)).

Fresno County Complaint

On June 11, 2015, approximately eight days after the Fresno Police Department obtained the arrest warrant for defendant and 16 days after defendant was arrested in the stolen car, a felony complaint was filed in the Superior Court of Fresno County case No. F15903615.

The complaint charged defendant with counts 1 and 2, robbery of J.L. and Luis (§ 211); and count 3, attempted robbery of Shane (§§ 211, 664), with the special allegations that defendant personally used a firearm in the commission of the offenses (§ 12022.53, subd. (b)).

Plea and Sentence in Tulare County Case

On July 22, 2015, the preliminary hearing was scheduled for the Tulare County charges. Instead, defendant waived the preliminary hearing and pleaded no contest to

count 1, carjacking of Theodore; count 2, second degree robbery of Theodore; and count 3, receiving stolen property, the revolver.

Defendant entered the plea with an indicated sentence of six years eight months in state prison, with the firearm allegations to be dismissed at the time of sentencing. The parties stipulated to the police reports as the factual basis for the plea.

On August 18, 2015, the court sentenced defendant to an aggregate term of six years eight months in state prison, based on the midterm of five years for count 1, carjacking; with consecutive sentences (one-third the midterms) of one year for count 2, robbery, and eight months for count 3, receiving stolen property. The court dismissed the firearm allegations.

PROCEEDINGS IN FRESNO COUNTY

Defendant's Speedy Trial Motion

On or about October 24, 2016, over one year after he entered his plea in Tulare County, defendant filed a motion in pro. per. in the Superior Court of Fresno County for "warrant" Nos. F15903615 [the Fresno County charges], M14925580, and M15913387 [unknown cases]. Defendant's motion was directed to the warden of the California State Prison in Solano and sought his removal from state prison to Fresno County for the above-numbered cases.[12]

[12] Defendant's motion was filed pursuant to section 1381, which is one of the statutory speedy trial provisions that is supplementary to the constitutional speedy trial guaranty. (*Craft v. Superior Court* (2006) 140 Cal.App.4th 1533, 1539; *People v. Wagner* (2009) 45 Cal.4th 1039, 1046.) At the subsequent hearing on defendant's motion to dismiss, both the People and defense counsel agreed that the validity of defendant's section 1381 motion was not relevant to his motion to dismiss for multiple prosecutions under section 654.

Fresno County Hearings

On October 27, 2016, the Fresno County District Attorney's office requested and obtained a court order for the production of the defendant from the state prison in Solano to Fresno County for prosecution of the Fresno robberies charged in case No. F15903615.

On November 14, 2016, defendant, represented by the public defender's office, appeared in Fresno County Superior Court for arraignment on the criminal complaint for the robberies charged in case No. F015903615. Defendant waived reading of the complaint and the advisement and pleaded not guilty and denied the firearm allegations. The court set the preliminary hearing for November 29, 2016.

On November 22 and December 13, 2016, the court granted defendant's motions to vacate and reset the preliminary hearing, and defendant entered time waivers. The preliminary hearing was eventually set for January 10, 2017.

On January 10, 2017, the court convened for the preliminary hearing. Defendant moved for a continuance because of a possible motion to be filed, and that full discovery had not been received. Over the People's objection, the court continued the preliminary hearing to February 23, 2017. Defendant's general time waiver remained.

DEFENDANT'S MOTION TO DISMISS

The instant appeal involves defendant's motion to dismiss the entirety of the Fresno robbery charges because of the alleged violation of section 654's prohibition against multiple prosecutions. Defendant's motion was based on the factual and procedural history set forth above.

Defendant's Motion

On February 22, 2017, defendant filed a motion in the Superior Court of Fresno County to change his plea to "once in jeopardy" and dismiss the complaint that charged him with two robberies and one attempted robbery.

Defendant's motion asserted the prosecution of the Fresno County case was barred by his plea in the Tulare County case because it would violate the federal and state

constitutional prohibitions against double jeopardy, and the statutory prohibition against multiple prosecutions in section 654 and *Kellett*.[13]

Defendant argued all the offenses based on the carjacking in Tulare County and the robberies in Fresno County should have been consolidated and charged in one action in either county. Defendant claimed the Fresno County District Attorney's office was trying to " 'recycle the evidence' used in the prosecution of the defendant in Tulare County to prosecute him in the current case."

Defendant further argued there was "crossover" between the evidence in the Tulare and Fresno cases because the carjacking of the Ford Focus in Tulare County "furnished evidence" that would be used to prosecute him in Fresno County since defendant was arrested in the stolen car in Fresno; J.L.'s stolen property was found in the Ford Focus; Luis described the Ford as being used in the robbery committed against him; the gun found in the Ford had been stolen in Tulare County and was described by Shane; and the same cell phone number had been used in the Tulare and Fresno County cases.

Defendant argued that Theodore, the carjacking victim in Tulare County, was the only person who identified defendant from the photographic lineup, and that evidence could be used to bolster the Fresno County case.[14]

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[13] Defendant's motion to dismiss was supported by the documentary exhibits summarized above: the police reports from the Visalia Police Department about the carjacking, the recovery of the stolen car in Fresno, and the search of the stolen car; the reports from the Fresno Police Department about the arrest of defendant in the stolen car, and the discovery of the stolen revolver and Luis's stolen merchandise in the car; the reports from both departments about the photographic lineups shown to the victims of the Visalia and Fresno cases; and the declaration for the arrest warrant in the Fresno case. The exhibits also included the complaint and minute orders for defendant's plea and sentencing in the Tulare County case; and defendant's section 1381 motion for removal to Fresno County.

At the hearing on defendant's motion to dismiss, defense counsel stated that she had not attached "all the police reports in this case, because there's too many. So I attached the ones that I thought would give the Court … a good understanding of all the facts."

Defendant claimed the Fresno County District Attorney's Office was advised of the connection between the four victims in the Tulare and Fresno cases because the Fresno Police Department's report about defendant's arrest stated that he had been turned over to the Visalia Police Department; and the declaration by Fresno Police Detective Rhames in support of the arrest warrant for defendant described the carjacking in Tulare County. Defendant's whereabouts "was not a mystery. The prosecution of all charges could have been joined in one Complaint in either Fresno or Tulare County pursuant to sections 781 or 786. The Fresno County District Attorney's office sat on this case and did not bring [defendant] to Fresno until it received his [section] 1381 demand …."

The People's Opposition

On March 15, 2017, the People filed opposition to defendant's motion to dismiss.[15] The People argued the two cases involved prosecuting agencies that did not know about each other's cases. The People further argued there were evidentiary distinctions between the two cases because the Fresno County crimes were committed against different victims at different locations and on different dates than the carjacking in Tulare County. "The only nexus between these cases is the fact that Defendant was using the car he stole in the Tulare County case as transportation in the Fresno County cases." and the Fresno and Tulare county cases occurred on different dates.

The Court's Tentative Ruling

On March 23, 2017, the court conducted a hearing on defendant's motion to dismiss. After hearing arguments from the parties, the court tentatively denied the

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[14] According to the Visalia Police Department's report of May 26, 2015, Theodore selected defendant's picture from the photographic lineup and said defendant " 'looked very similar' " to the suspect but also " 'a little bit different.' "

[15] The People's opposition relied on the documentary exhibits that had been submitted by defendant in support of his motion to dismiss.

motion to dismiss based on the analysis in *People v. Valli* (2010) 187 Cal.App.4th 786 (*Valli*).[16]

> "These are wholly separate events in time and place. It is true that … it could be that the events are so closely related, not just joinable, but so transactionally related that the *Kellett* rule should apply…. But nothing in this case, it seems to me, meaning the cross admissibility of evidence, which is all that we have here, the cross admissibility of the evidence about the use of the gun and the use of the vehicle. And I'm not quite sure the use of a phone number. I think those three things apply. That the cross admissibility of that evidence makes these offenses so transactionally related that the *Kellett* rule ought to apply for due process to be satisfied. That is not that situation in this Court's view. My tentative ruling is to deny the motion to dismiss." (Italics added.)

The court set the matter for another hearing to give defendant an opportunity to file a supplementary brief.

Defendant subsequently filed a supplementary response and argued the common evidence between the charges meant the Tulare and Fresno cases were "transactionally related."

The Court's Denial of Defendant's Motion to Dismiss

On April 13, 2017, the court convened the continued hearing on defendant's motion to dismiss and the parties submitted the matter.

The court first found that the two prosecuting agencies knew of the charges pending against defendant:

> "The contention is that the prosecutors in both those jurisdictions either knew or should have known of the transactionally-related criminal conduct occurring in both counties, at the time that the charges were filed in Tulare, and at the time the plea was taken in Tulare…. That assertion I'm accepting as an accurate statement. That they – if they didn't know

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[16] As we will discuss below, *Valli* applied an "evidentiary test" to determine whether multiple prosecutions are barred by section 654 and *Kellett*. (*Valli*, *supra*, 187 Cal.App.4th at pp. 794–795.)

> directly, they certainly should have known given the cooperation with the law enforcement agencies in this case."

The court stated that *Valli* explained there were two lines of decisions as to whether *Kellett* applied. One line of cases held that *Kellett* did not apply "if the offenses do not arise from the same act." The court found that under this line of cases, "these are clearly separate robberies in Fresno County occurring at different places obviously and at different times than the allegations that were charged in the Tulare County case."

The court stated the second line of cases applied an evidentiary test to determine if *Kellett* applied, "even when those offenses don't arise from the same act." Under the evidentiary test, *Kellett* applies "if the evidence needed to prove one offense necessarily supplies proof of the other."

The court agreed with defendant that the evidentiary test should be applied to determine if the *Kellett* rule barred the Fresno County charges. However, the court rejected defendant's argument about evidentiary crossover between the two cases.

> "But applying that evidentiary rule to the particular circumstances of this case, this Court concludes that joinder of the Tulare County prosecution with the Fresno County prosecution was not required under *Kellett* and that it did not apply. [¶] It is true, as the Defense has argued, that certain evidence from the Tulare case would likely be presented in the trial of the Fresno robberies: the phone, and the phone number, in particular, the gun that was used in the case, and the stolen vehicle that was taken in Tulare earlier. However, none of that evidence necessarily proves the robbery charges in Fresno or any element of those charges. And *Valli*, of course, stands for the proposition that the Court relied on earlier that simply using facts from the first prosecution in the subsequent prosecution does not trigger *Kellett*." (Italics added.)

The court acknowledged that either Fresno County or Tulare County had jurisdiction to file all the charges against defendant, but there was "a serious question about the application of *Kellett* where more than one jurisdiction is involved. [T]he Defense's argument here is essentially that the legislature in *Kellett* require that the prosecution in those cases be in one county or the other. So to apply *Kellett* would in

effect rewrite the law in the State of California that gives prosecutorial authorities the option to file these cases in one jurisdiction or the other and instead demand that they be filed in one or the other. [¶] So the Court is declining to apply *Kellett* in these circumstances for that as well as the other reasons I've already articulated." (Italics added.)

Plea and Sentence in Fresno County Case

Also, on April 13, 2017, immediately after the court denied defendant's motion to dismiss, the parties advised the court that they had already discussed a negotiated disposition for the pending charges.

Defendant pleaded no contest to counts 1 and 2, second degree robberies of J.L. and Luis, for a maximum term of five years. The court granted the People's motion to dismiss count 3, attempted robbery of Shane, and strike the firearm allegations.[17] The parties stipulated to the police reports as the factual basis for the plea.

On May 12, 2017, the court sentenced defendant to the lower term of two years for count 1, plus one year (one-third the midterm) for count 2, for an aggregate term of three years in prison, with no time credits since defendant was already serving a state prison sentence. The court stated that while it had denied defendant's motion to dismiss under *Kellett*, it decided to order the sentence in the Fresno case to run concurrently to the term already imposed in Tulare County case because the offenses were transactionally related.

On May 16, 2017, defendant filed a notice of appeal, and requested and obtained a certificate of probable cause.

DISCUSSION

Defendant renews the arguments he made in the superior court – that the multiple prosecution prohibition in section 654 barred the Fresno County charges because of the

[17] The prosecutor and defense counsel advised the court that the firearm enhancements would be stricken because the Visalia Police Department had destroyed the revolver that was found with defendant in the stolen car.

evidentiary overlap with the Tulare County charges, and his motion to dismiss the Fresno County charges should have been granted.

I. Section 654 and *Kellett*

As explained above, defendant's arguments are based on the prohibition against multiple provision prosecutions contained in the latter portion of section 654, subdivision (a): "An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

" 'Section 654's preclusion of multiple prosecution is separate and distinct from its preclusion of multiple punishment. The rule against multiple prosecutions is a procedural safeguard against harassment and is not necessarily related to the punishment to be imposed; double prosecution may be precluded even when double punishment is permissible.' [Citation.]" (*Valli, supra*, 187 Cal.App.4th 786, 794–795; *People v. Ochoa* (2016) 248 Cal.App.4th 15, 27 (*Ochoa*).)

Kellett is the seminal case interpreting section 654's ban on multiple prosecutions. The defendant in *Kellett* pleaded guilty to exhibiting a firearm in a threatening manner, and then moved to dismiss the information in a second case charging him with possession of a concealable weapon by a felon. (*Kellett, supra*, 63 Cal.2d at p. 824.) Both offenses were based on an incident where he "was standing on a public sidewalk with a pistol in his hand." (*Id*. at p. 824.) *Kellett* held that to avoid needless harassment of defendants and the waste of public funds, "some acts that are divisible for the purpose of punishment must be regarded as being too interrelated to permit their being prosecuted successively." (*Id.* at p. 827.) When "the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Ibid.*, fn. omitted.) "It would constitute wholly

unreasonable harassment … to permit trials seriatim until the prosecutor is satisfied with the punishment imposed." (*Id.* at pp. 825–826; see also *People v. Goolsby* (2015) 62 Cal.4th 360, 366.)

The purpose of the bar to multiple prosecutions in section 654 and *Kellett* "is to prevent the needless harassment and waste of resources that may result from multiple prosecutions for the same act or course of conduct: 'If needless harassment and the waste of public funds are to be avoided, some acts that are divisible for the purpose of punishment must be regarded as being too interrelated to permit their being prosecuted successively.' [Citation.]" (*Ochoa*, *supra*, 248 Cal.App.4th at p. 28.)

"The bar on multiple prosecutions sweeps more broadly than the prohibition on multiple punishments under Section 654: 'When there is a course of conduct involving several physical acts, the actor's intent or objective and the number of victims involved, which are crucial in determining the permissible punishment, may be immaterial when successive prosecutions are attempted.' [Citations.]" (*Ochoa*, *supra*, 248 Cal.App.4th at p. 28; *Valli*, *supra*, 187 Cal.App.4th at p. 797.)

However, "[t]he *Kellett* rule applies only where 'the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part.' [Citation.]" (*Valli*, *supra*, 187 Cal.App.4th at p. 796.) "The rule may apply even if multiple prosecutors act independently in charging the defendant, such that no single prosecutor is aware of the multiple prosecutions. The duty to join is particularly strong where the multiple offenses are serious in nature. 'When both offenses are serious crimes, the potential for harassment and waste is sufficiently strong that section 654 imposes on prosecutors an administrative duty to insure that the charges are joined.' [Citation.]" (*Ochoa*, *supra*, 248 Cal.App.4th at p. 28.)

"Appellate courts have adopted two different tests under *Kellett* to determine whether multiple offenses occurred during the same course of conduct. [Citation.] Under one line of cases, multiple prosecutions are not barred if the offenses were

committed at separate times and locations. [Citations.] We will refer to this as the 'time and place test.' " (*Ochoa*, *supra*, 248 Cal.App.4th at p. 28.)

"A second version of the test – the 'evidentiary test' – looks to the evidence necessary to prove the offenses. [Citation.] '[I]f the evidence needed to prove one offense necessarily supplies proof of the other, … the two offenses must be prosecuted together, in the interests of preventing needless harassment and waste of public funds.' [Citation.] 'The evidentiary test … requires more than a trivial overlap of the evidence. Simply using facts from the first prosecution in the subsequent prosecution does not trigger application of *Kellett*.' [Citation.]" (*Ochoa*, *supra*, 248 Cal.App.4th at p. 28; *People v. Hamernik* (2016) 1 Cal.App.5th 412, 427.)

"Whether the bar against multiple prosecution applies must be determined on a case-by-case basis. [Citation.] We review factual determinations under the deferential substantial evidence test, viewing the evidence in the light most favorable to the prosecution. [Citation.] We review de novo the legal question of whether Section 654 applies. [Citation]" (*Ochoa*, *supra*, 248 Cal.App.4th at p. 29, fn. omitted.)

There are thus two "related but distinct questions" to determine whether a subsequent prosecution is barred by section 654. The first question is " 'whether on the record herein the prosecution was or should have been "aware of more than one offense." ' [Citation.]" (*People v. Hendrix* (2018) 20 Cal.App.5th 457, 464 (*Hendrix*).) The second question is "whether 'the same act or course of conduct play[ed] a significant part' in both offenses [citation]," a question that has been addressed under either the "time and place test" or the "evidentiary test." (*Ibid.*; *Ochoa*, *supra*, 248 Cal.App.4th at p. 28; *Valli*, *supra*, 187 Cal.App.4th at p. 799.)

II. Awareness of Cases by the Prosecuting Agencies

The threshold question is whether the prosecuting agencies in Fresno and Tulare Counties knew or should have been aware of the two cases pending against defendant. (*Valli*, *supra*, 187 Cal.App.4th at p. 796.)

In *In re Dennis B.* (1976) 18 Cal.3d 687, a minor caused a fatal collision while making an unsafe lane change. After he was convicted of the traffic infraction, a petition was found true in the juvenile court for vehicular manslaughter. The minor appealed and argued the juvenile court proceedings were barred by section 654. (*Id*. at p. 690.) *Dennis B*. rejected the argument and found the prosecution was not actually aware, nor should it have been aware, of more than one offense. "The reference in *Kellett* to situations in which 'the prosecution is … aware of more than one offense' applies, however, only to intentional harassment, i.e., to cases in which a particular prosecutor has timely knowledge of two offenses but allows the multiple prosecution to proceed." (*Id*. at p. 693.) Since "the district attorney's office played a limited role in the prosecution of routine traffic offenses," there was no evidence any particular prosecutor "actually knew of both offenses in time to prevent a multiplicity of proceedings." (*Ibid*.) The court further found "the minimal potential for harassment and waste caused by defendant's multiple prosecution in the case at bar is outweighed by the state's interests in preserving the summary nature of traffic proceedings and insuring that a defendant charged with a felony or serious misdemeanor does not evade appropriate disposition. [Citation.]" (*Id*. at p. 696.)

In *People v. Martin* (1980) 111 Cal.App.3d 973, the defendant was arrested for possession of marijuana and a sawed-off shotgun that was found in his car after a traffic stop. After he was booked, the police learned the shotgun had been reported stolen. The defendant pleaded guilty to the misdemeanor weapons and narcotic offenses. An information was then filed charging him with the burglary in which the shotgun was stolen. (*Id*. at p. 976.) It was undisputed the prosecution did not know of his involvement in the burglary when he pled to the misdemeanor charges. (*Id*. at p. 977.) The defendant argued the prosecution should be charged with such knowledge. *Martin* disagreed because the burglary and the traffic stop were separate incidents as to time, place, and character. (*Id*. at pp. 977–978.) *Martin* concluded that *Kellett* did not apply

because the prosecutor neither knew nor should have known of all the offenses at the relevant time. (*Ibid.*)

Analysis

Based on the documentary exhibits submitted in support of defendant's motion to dismiss, the law enforcement agencies in both counties were communicating with each other about the two cases after defendant was arrested.

Detective Royal of the Fresno County Sheriff's Department's HEAT team prepared an extensive report, dated May 26, 2015, about defendant's arrest in Fresno, that he was in a vehicle that had been taken during a carjacking in Tulare County, and he was turned over to the Visalia Police Department. The May 26, 2015, report from the Visalia Police Department acknowledged that officers in Fresno reported that defendant had been arrested, he was the suspect in the carjacking of Theodore in Tulare County, and he was remanded into their custody. The report from the Visalia Police Department did not address defendant's possible involvement in the robberies in Fresno County.

Detective Rhames of the Fresno Police Department signed the declaration for defendant's arrest warrant in Fresno County on June 3, 2015, and extensively addressed both the Tulare County carjacking and the robberies in Fresno County. The felony complaint had already been filed in Tulare County when Detective Rhames signed the declaration.

Detective Royal's report on May 26, 2015, about defendant's arrest concluded that "[a]ll charges to be filed by Visalia Police Department under case 15-06777 in Tulare County. This report is for documentation only." While there are no corresponding reports from the prosecuting agencies, defendant points to a handwritten notation at the bottom of Detective Royal's report that states: "DA 05/27/15." The identity of the county is not clear, particularly since the same report stated that defendant had been turned over to the Visalia Police Department.

In any event, we review factual determinations underlying section 654 pursuant to the deferential substantial evidence test, viewing the evidence in the light most favorable to the prosecution. (*Ochoa*, *supra*, 248 Cal.App.4th at pp. 28–29.) In addressing defendant's motion to dismiss, the superior court found that if the prosecutors in Fresno County and Tulare County "didn't know directly, they certainly should have known given the cooperation with the law enforcement agencies in this case." Such an inference is certainly supported by the reports submitted by defendant in support of his motion to dismiss, and we will not disturb the court's finding. (*Id.* at pp. 40–41.)

III. Time and Place Test

The next question is whether the same act or course of conduct played a significant part in both offenses. (*Hendrix*, *supra*, 20 Cal.App.5th at p. 464; *Ochoa*, *supra*, 248 Cal.App.4th at p. 28; *Valli*, *supra*, 187 Cal.App.4th at p. 799.) As noted above, appellate courts have set forth two tests to make this determination. Instead of deciding whether the time and place test or the evidentiary test controls this determination, we will find that the prosecution in Fresno County was not barred under either test. (See, e.g., *People v. Linville* (2018) 27 Cal.App.5th 919; *Ochoa*, *supra*, 248 Cal.App.4th at p. 32.)

"Under the time and place test, multiple prosecutions are not barred if the offenses were committed at separate times and locations." (*Ochoa*, *supra*, 248 Cal.App.4th at p. 32.)

In *People v. Douglas* (1966) 246 Cal.App.2d 594 (*Douglas*), the police attempted to arrest two defendants for a series of robberies, a gunfight began, and an officer was killed. Both defendants were tried for murder and only one was convicted. The defendants were then tried for multiple counts of robbery and other crimes and convicted of the majority of the charges. (*Id*. at p. 596.)

Douglas rejected the defendants' claim that the subsequent robbery prosecution was barred by section 654 and *Kellett*. "[I]n the present [robbery] case defendants were

prosecuted for unrelated offenses arising from separate physical acts performed at different times. A murder, a robbery, an assault, like every other action, normally has a beginning, a duration, and an end, and where, as here, none of these overlap, simultaneous prosecution is not required under any present theory of jurisprudence…. [¶] While a defendant may not be subjected to a series of trials in an effort to wear him down, harass him, or obtain an acceptably severe judgment, we see no reason to require prosecutors to proceed against a defendant simultaneously for all known offenses, whether related to one another or not, in order to guard against the possibility of harassment. The adoption of such a rule would tend to aggravate the very harassment it was designed to alleviate by impelling a prosecutor filing on one charge to throw the book at the defendant in order to prevent him from acquiring immunity against other potential charges and to protect the prosecutor from accusations of neglect of duty." (*Douglas*, *supra*, 246 Cal.App.2d at p. 599.)

In *People v. Ward* (1973) 30 Cal.App.3d 130 (*Ward*), the defendant kidnapped and sexually assaulted a woman and left her in the trunk of his car. The defendant drove to another location and sexually assaulted her daughter. The defendant was charged in San Bernardino County with sexually assaulting the daughter and pleaded guilty. He was subsequently charged in Los Angeles County with kidnapping and raping the mother. The defendant moved to dismiss the Los Angeles charges under *Kellett*. (*Id.* at p. 133.)

Ward held *Kellett* did not bar the Los Angeles prosecution. "The crimes were committed at different locations, at different times, against different victims, and with different objectives. The mere fact that they occurred in defendant's vehicle during the same night does not connect them as parts of a continuous course of conduct. [Citation.]" (*Ward*, *supra*, 30 Cal.App.3d at p. 136.)

In *People v. Cuevas* (1996) 51 Cal.App.4th 620, the court held that the defendant's conviction for possession of cocaine for sale did not bar subsequent prosecution for two prior cocaine sales occurring on different dates. "*Kellett* does not require, nor do the

cases construing it, that offenses committed at *different times and at different places* must be prosecuted in a single proceeding." (*Id*. at p. 624, original italics.)

In *People v. Britt* (2004) 32 Cal.4th 944 (*Britt*), distinguished on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 344, fn. 14, the defendant was a registered sex offender who moved from Sacramento County to El Dorado County without registering or notifying authorities in either county. A complaint was filed in Sacramento County for failing to register, and the defendant pleaded no contest. While the charges were pending in Sacramento, a complaint was filed in El Dorado County charging him with failing to register there, and the preliminary hearing was held after he had entered his plea in Sacramento. The defendant moved to set aside the charges in El Dorado under section 654 and *Kellett*, and the motion was denied. (*Id*. at pp. 949–950.)

Britt held that "prosecuting the El Dorado County action after defendant had been convicted of the Sacramento County charges" (*Britt*, *supra*, 32 Cal.4th at p. 956) violated section 654 and *Kellett* because "the same act or course of conduct – a single unreported move within California – played a significant part in both omissions." (*Britt*, *supra*, p. 954.) There was "clear" evidence that the prosecutor's office in El Dorado County was "fully aware of the simultaneous Sacramento County prosecution." (*Id*. at pp. 955–956.) *Britt* held that state law permitted the joinder of the offenses in a single proceeding under sections 781 and 954, even though they had been committed in two different counties. (*Id*. at p. 955.) "The notification requirements … were triggered by defendant's moving from Sacramento County to El Dorado County. This single move necessarily involved preparatory acts in both counties. Thus, either county would be a proper venue in which to try both crimes. Moreover, the two crimes are connected together in their commission and are of the same class of crimes; accordingly, they may be joined in the same accusatory pleading. [Citation]." (*Ibid*.)

Analysis

Defendant's motion to dismiss would have been properly denied under the time and place test. In contrast to the situation in *Britt*, defendant was not charged with multiple offenses based on a single act or course of conduct. Instead, the carjacking of Theodore occurred on the night of May 20, 2015, when the victim was lured to an apartment complex in Visalia to deliver pizzas; he was tackled and robbed, one man displayed a gun, and two men drove away in his car. The complaint filed in Tulare County charged defendant with the carjacking and robbery of Theodore. Defendant was also charged with receiving stolen property, based on the stolen revolver found in his possession when he was arrested in Fresno. According to the police reports, the revolver had been stolen in Visalia in 2013; defendant was not charged with stealing the weapon.

The robberies occurred on May 22 and 25, 2015, in Fresno when the victims received telephone calls from a person who wanted to buy the PlayStation equipment that had been advertised for sale on Craigslist. In each case, the victims agreed to meet the caller at a certain location, the victims were confronted by one or two men, one man had a gun, and the victims were ordered to turn over their property. Defendant was charged in Fresno County with the robberies of J.L. and Luis and the attempted robbery of Shane, who had refused to give up his property.

As in *Douglas* and *Ward*, the crimes charged in Tulare County occurred at different times and places than the offenses alleged in the Fresno County complaint. Based solely on a time and place analysis, defendant's course of conduct did not form a significant part of the offenses charged in both prosecutions, and section 654 did not bar the Fresno County case.

IV. Evidentiary Test

In *Valli*, the court acknowledged the line of cases which relied on the "separate times and locations" test for multiple prosecutions under section 654. (*Valli, supra*, 187 Cal.App.4th at p. 797.) However, *Valli* held that *Kellett* was "not necessarily a simple

'different time/different place' limitation," (*Valli, supra*, at p. 798) and held it was more appropriate to use the evidentiary test to determine whether a subsequent prosecution was barred by section 654. (*Valli, supra*, p. 798.) In this case, the superior court agreed with *Valli* and similarly relied on the evidentiary test to review defendant's motion to dismiss.

"Under the evidentiary test, we consider whether the evidence needed to prove one offense necessarily supplies proof of the other. [Citation.]" (*Ochoa, supra*, 258 Cal.App.4th at p. 36.) "The evidentiary test … requires more than a trivial overlap of the evidence. Simply using facts from the first prosecution in the subsequent prosecution does not trigger application of *Kellett*." (*Valli, supra*, 187 Cal.App.4th at p. 799.)

In *People v. Hurtado* (1977) 67 Cal.App.3d 633 (*Hurtado*), the defendant was pulled over for driving erratically and at excessive speeds and was arrested for driving under the influence (DUI). While being handcuffed, the defendant attempted to hide a cigarette package that contained heroin. He was charged with three narcotics offenses in one case and DUI in a separate case. After pleading guilty to the DUI charge, the defendant moved to dismiss the narcotics case pursuant to section 654, and the motion was denied. (*Id*. at pp. 635–636.)

Hurtado held the narcotics prosecution was not barred under the evidentiary test.

> "[T]he evidentiary pictures which had to be painted to prove the [DUI] and narcotics offenses were sufficiently distinct so as to permit separate prosecutions.... Proof of the [DUI] charge was supplied primarily by the observations of the highway patrol officers made after defendant was stopped and given certain sobriety tests. Proof of the heroin charges hinged upon the discovery of the cigarette package filled with heroin, which occurred after the arrest for [DUI] had been made. Evidence in the two cases, was for the most part mutually exclusive, the only common ground being the fact that defendant was in the moving automobile in possession of the heroin at the same time that he was under the influence of alcohol. Such a trivial overlap of the evidence … does not mandate the joinder of these cases. [Citation.]" (*Hurtado, supra*, 67 Cal.App.3d at pp. 636–637.)

In *Valli, supra*, 187 Cal.App.4th 786, the defendant was acquitted of murder, attempted murder, and being an ex-felon in possession of a gun. The defendant was then

charged with two counts of felony evading based on evidence presented at the first trial, that he evaded the police for several days after the murder. The evasion evidence had been introduced in the murder case to show defendant's consciousness of guilt. (*Id*. at p. 790.) The defendant's guilt at the felony evading trial was partially established by his testimony at the murder trial, when he admitted committing felony evasion. The defendant's pretrial motion to dismiss the evading charges based on section 654 was denied. (*Ibid*.)

Valli held the same act or course of conduct did not play a significant part in both prosecutions under the evidentiary test. "Different evidentiary pictures are required – one of a shooting at night and the other of police pursuits in the following days. Different witnesses would testify to the events." (*Valli*, *supra*, 187 Cal.App.4th at p. 799.)

Valli acknowledged that the prosecution had relied on evidence about the felony evading to prove the murder charge, and many of the same witnesses appeared at the murder trial, so that "there was 'a recycling of much of the same evidence which the People had to support the earlier prosecutions.' [Citation.]" (*Valli*, *supra*, 187 Cal.App.4th at pp. 799–800.) However, *Valli* held "the evidence needed to prove murder – that defendant was the shooter – did not supply proof of evading. Evidence of evading showed at most a consciousness of guilt as to the murder," but had been insufficient "to supply proof of the murder." (*Ibid*.) "[A]lthough the People relied in part on proof of the evading in order to prove the murder," the necessary interrelation of murder and evading is missing; …" (*Id*. at p. 801.)

In *Hendrix*, *supra*, 20 Cal.App.5th 457, the defendant was stopped for driving through a red light and issued a citation. During the traffic stop, the officers determined the defendant was under the influence and arrested him. The defendant paid the fine for the citation and then moved to dismiss the criminal DUI charges. He argued that paying the fine barred the subsequent criminal prosecution under *Kellett* and section 654. His motion was denied. (*Hendrix*, *supra*, at pp. 459–462.)

Hendrix held the motion to dismiss was properly denied because the two cases were not based on the same course of conduct under the evidentiary test.

> "[T]he evidence required to prove the red light infraction was sufficiently distinct from that required to prove the charges in the DUI case so as to permit separate prosecutions. Although the red light infraction and the DUI offenses were recorded in the same police report, all that is needed to prove the red light infraction is proof defendant rolled through that light. The fact defendant was intoxicated when he did so is not relevant to his liability for this infraction of the Vehicle Code. Conversely, the evidence needed to prove the DUI offenses was supplied by the observations the officers made after defendant was stopped, his failure to successfully perform various field sobriety tests, and his subsequent BAC testing. This evidence depended in no way on the circumstances that led to defendant being pulled over. The offenses are thus factually distinct." (*Hendrix*, *supra*, 20 Cal.App.5th at pp. 464–465.)[18]

Analysis

Defendant argues the Fresno County charges should have been dismissed under the evidentiary test because of the crossover of evidence between the Tulare and Fresno county cases based on his "five day crime spree," since he was arrested while "sitting in the Visalia victim's carjacking vehicle in Fresno" and "the Fresno prosecutor needed the evidence from the Tulare incident to be assured of a conviction. Defendant further argues that "the Fresno prosecutor could not proceed on the Fresno robberies without the Tulare evidence because the Fresno victims could not positively identify [defendant], and therefore the Fresno prosecutor would necessarily have had to rely on other evidence to obtain a conviction."

Defendant argues the following facts demonstrate that the Fresno County case was barred by the evidentiary test: the telephone number that was used to order the pizzas and resulted in the carjacking in Tulare County was the same telephone number used to

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[18] *Hendrix* also noted that, as in *Dennis B.*, there was no assertion "the district attorney's office handled the prosecution of the red light infraction. Indeed, district attorney's offices typically play a limited role in the prosecution of routine traffic offenses. [Citation.]" (*Hendrix*, *supra*, 20 Cal.App.5th at p. 465.)

call the three victims in Fresno; Luis obtained the license plate number of the vehicle used by the two suspects in Fresno, and it belonged to the car stolen from Theodore in Tulare County; the merchandise stolen from J.L. in Fresno was found inside the stolen car when defendant was arrested in Fresno; the revolver found in the stolen car when defendant was arrested in Fresno was consistent with Shane's description of the weapon used by the suspect in Fresno; and defendant was charged with receiving stolen property in Tulare County based on his possession of that weapon.

Defendant thus asserts that his "possession of the carjacked vehicle, along with the game console belonging to one of the Fresno victims, was the link which made the offenses in both counties transactionally related" for purposes of section 654.

To the contrary, applying the evidentiary test to this case, the evidence necessary to prove the carjacking in Tulare County did not necessarily supply proof of the robberies in Fresno County. As in *Valli*, "[d]ifferent evidentiary pictures" and "[d]ifferent witnesses" were required to prove the charges in the two counties. (*Valli*, *supra*, 187 Cal.App.4th at p. 799.)

First, the police reports do not support defendant's claim that Theodore positively identified him as the carjacking suspect. When Theodore looked at the photographic lineup, he said that he believed defendant's picture looked familiar but also " 'a little bit different.' " Theodore wrote on the comment section of the photographic lineup that defendant's picture " 'looked very similar' " to the suspect.

As for the Fresno victims, Luis said defendant's picture "looked like the suspect and that he was 80% sure." J.L. selected defendant's photograph as "the closest" but also pointed to two other pictures as similar to the suspect, and Shane selected another person's photograph.

Second, the carjacking of Theodore's vehicle did not have any evidentiary crossover with the robberies in Fresno. While defendant was arrested in the stolen car, the damaging evidence against him was independent of the Tulare County carjacking:

Luis had obtained that license plate number for the vehicle used by the robbery suspects, J.L.'s stolen property was found inside the car when defendant was arrested, and a revolver that appeared to match the description given by Shane was found wedged between the driver's seat and the center console. The fact that the car had been stolen in Tulare County was not relevant to proving defendant's complicity in the robberies in Fresno.

Third, the fact that the same telephone number was used to call in the pizza order that lured Theodore to the apartment building and contact the three robbery victims about buying their merchandise in Fresno, did not mean that the Tulare County evidence was required to prove defendant's guilt for the Fresno robberies. The three Fresno victims identified the same telephone number as being used to arrange the meetings that resulted in the robberies of J.L. and Luis, and the attempted robbery of Shane. More importantly, Detective Rhames's report identified that telephone number as being associated with defendant during a prior investigation in 2015. The police reports state that a warrant had not yet been obtained for the cellular data for that telephone number. There was likely evidence entirely independent of the Tulare County case that may have connected defendant to that telephone number.

Fourth, the presence of the stolen revolver in the car does not connect the Tulare and Fresno County cases. The police determined the revolver had been reported stolen in Tulare County in 2013. However, defendant was not a suspect in that case and there are no facts in the record that connected defendant to the theft of that weapon. Instead, defendant was charged with receiving stolen property based on his possession of the revolver.

Finally, the revolver was relevant to Shane's description of the weapon used by the gunman in the attempted robbery, and not the fact that defendant was charged with receiving it as stolen property in Tulare County. Shane described a revolver with a wood grip with light or dull metal. Detective Rhames reported that Shane's description

matched the weapon found in defendant's car. Theodore's description of the weapon used by the carjacking suspect was not as precise. As already noted, defendant was not suspected of, or charged with, stealing the revolver. He was charged in Tulare County with receiving stolen property based on the gun, but he was not charged with a similar offense in Fresno.

As in *Valli*, reliance on evidence common to both cases did not bar the Fresno County prosecution because the evidence needed to prove defendant carjacked Theodore in Tulare County did not supply proof of the robberies in Fresno. We conclude the superior court properly denied defendant's motion to dismiss the Fresno County charges because the same act or course of conduct did not play a significant part in both cases based on both the time and place test and the evidentiary test.

DISPOSITION

The judgment is affirmed.

_____
POOCHIGIAN, Acting P.J.

WE CONCUR:

_____
DETJEN, J.

_____
PEÑA, J.